

UNITED STATES OF AMERICA

v.

Manning, Bradley E.  
PFC, U.S. Army,  
HHC, U.S. Army Garrison,  
Joint Base Myer-Henderson Hall  
Fort Myer, Virginia 22211

Prosecution Motion

for Protective Order

21 February 2012

### RELIEF SOUGHT

The United States in the above case requests the Court enter an appropriate protective order to guard against the compromise of classified information by the accused, defense counsel, and any individual detailed to the defense team.

### BURDEN OF PERSUASION AND BURDEN OF PROOF

The burden of proof on any factual issue the resolution of which is necessary to decide a motion shall be by preponderance of the evidence. RCM 905(c)(1). The burden of persuasion on any factual issue the resolution of which is necessary to decide a motion shall be on the moving party. RCM 905(c)(2). Although the defense is the original moving party, the United States is the appropriate moving party for a protective order for classified information. Military Rule of Evidence (MRE) 505(g)(1).

### FACTS

The accused is charged with twenty-two specifications, which involve documentary and physical evidence that contains classified information. Since 9 November 2011, the defense has been in possession of more than 300,000 pages of classified documents and more than twenty forensic images of digital media containing classified material. See Enclosure 1. Additionally, on 8 November 2011 the prosecution gave a classified briefing to defense counsel and their expert consultants, and another classified briefing on 18 November 2011, which included the accused.

On 28 July 2010, Major General Terry A. Wolff, Commander, 1st Armored Division and United States Division-Center, issued a protective order to protect classified information. See Enclosure 2. On 17 September 2010, Colonel Carl R. Coffman, Jr., Commander, Joint Base Myer-Henderson Hall, issued a protective order to protect classified information. See Enclosure 3. The accused and all defense counsel acknowledged the second protective order by 25 March 2011. See Enclosure 4.

On 17 September 2010, Colonel Coffman appointed (b)(7)(C) CG, U.S. Army Test and Evaluation Command, to the defense team, as an expert consultant in security matters. On 12 October 2010, Colonel Coffman appointed (b)(7)(C) CH, U.S. Army Intelligence and Security Command, to the defense team, as an additional expert consultant in security matters.

See Enclosure 5. Since their appointment, both security expert consultants have worked for the defense.

Between 25 August 2010 and 3 September 2010, the defense submitted four requests to have the Rule for Court-Martial (RCM) 706 board members authorized and cleared to discuss classified information, up to the "Top Secret" level with access to "Sensitive Compartmented Information." After his initial order dated 17 September 2010 and with the concurrence of the defense, on 22 September 2010, Colonel Coffman ordered both defense security expert consultants to determine whether the accused's mental impressions were potentially classified, which would require defense counsel, the RCM 706 board, and possibly defense experts to possess security clearances at the higher level. See Enclosure 6. On 10 November 2010, Colonel Coffman issued supplemental guidance to the defense security expert consultants, which authorized them limited use of the Secret Internet Protocol Reouter Network and Joint Worldwide Intelligence Communications System. See id. On 13 December 2010, both defense security expert consultants concluded their review and determined the accused does retain classified information above the secret level. See id.

On 12 October 2010, Colonel Coffman issued an order directing the exact locations for discussions and storage of classified information. See Enclosure 7. After the original order, he issued two updates, dated 22 June 2011 and 10 August 2011 respectively. Id.

On 19 September 2011, the prosecution delivered three standalone computers to the Senior Military Defense Counsel dedicated to the processing of classified information. These computers were and have been in defense's control and freely available for their use.

On 20 September 2011, the Senior Military Defense Counsel requested courier cards for members of the defense team to authorize them to transport classified evidence between Trial Defense Services offices within the United States and previously approved by Colonel Coffman for storage of classified information. See Enclosure 8. On 28 September 2011, Colonel Coffman approved this request, and each member of the military defense team's respective security manager issued them courier cards. Id.

#### **WITNESSES/EVIDENCE**

None.

#### **LEGAL AUTHORITY AND ARGUMENT**

The United States respectfully requests the Court issue a protective order pursuant to MRE 505(g)(1). At the request of the United States, the military judge "shall enter an appropriate protective order to guard against the compromise of the information disclosed to the accused." MRE 505(g)(1). MRE 505(g)(1) further outlines the following provisions that may be included:

- (A) Prohibiting the disclosure of the information except as authorized by the military judge;

- (B) Requiring storage of material in a manner appropriate for the level of classification assigned to the documents to be disclosed;
- (C) Requiring controlled access to the material during normal business hours and at other times upon reasonable notice;
- (D) All persons requiring security clearances shall cooperate with investigatory personnel in any investigations which are necessary to obtain a security clearance;
- (E) Requiring the maintenance of logs regarding access by all persons authorized by the military judge to have access to the classified information in connection with the preparation of the defense;
- (F) Regulating the making and handling of notes taken from material containing classified information; or
- (G) Requesting the convening authority to authorize the assignment of government security personnel and the provision of government storage facilities.

The United States includes with its motion a proposed protective order, which balances the requirement to protect classified information with the accused and defense counsels' need to access classified information. See Enclosures 9 and 10. In the enclosed proposed protective order, the United States incorporated all the provisions above, except "(E)", because this requirement seems to onerous at this time and not required. United States also combined the previously issued protective order, the nomination of Mr. Jay Prather as your court security officer, the appointment of the defense security expert consultants, the fact the defense is in possession of three computers authorized to process classified information, and the convening authority's multiple orders directing the exact locations for storage of classified information, handling, and couriering of classified information.

### **CONCLUSION**

The United States requests the Court enter an appropriate protective order to guard against the compromise of classified information by the accused, defense counsel, and any individual detailed to the defense team.



ASHDEN FEIN  
CPT, JA  
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Mr. David Coombs, Civilian Defense Counsel and Major Matthew Kemkes, Senior Military Defense Counsel, via electronic mail, on 21 February 2012.

A handwritten signature in black ink, appearing to be 'Ashden Fein', with a large, stylized initial 'A' and a long, sweeping horizontal stroke extending to the right.

ASHDEN FEIN  
CPT, JA  
Trial Counsel